No. 79-1068

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ASSOCIATED DRY GOODS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Question For Review

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b) and 2000e-8(e), prohibit the Equal Employment Opportunity Commission ("EEOC") from disclosing, prior to the institution of suit, information obtained during its investigation of a charge to the parties immediately involved in the charge.[1]

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[1] This articulation does not accurately reflect the issue here. The issue is whether the EEOC disclosure rules, which permit certain persons pre-litigation access to EEOC investigative files, conflict with section 709(e)'s ban on making public any information obtained by the EEOC during its investigations. *See* Brief for Respondent In Opposition To The Petition for a Writ of Certiorari, at 5-7. Section 706(b) does not concern investigative

Opinions Below

The opinion of the court of appeals (Pet. 1a-13a)[2] is reported at 607 F.2d 1075. The opinion of the district court (Pet. 16a-32a) is reported at 454 F. Supp. 387. An earlier opinion of the district court, denying the motion of the Equal Employment Opportunity Commission to dismiss the complaint, is reported at 419 F. Supp. 814.

Statutes and Regulations Involved

Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

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files, and the decisions below did not turn on application of this provision. *See* Amended Complaint (Joint Appendix 10-12) ("J.A.") district court opinion (Pet. 17a; 20a-22a) and court of appeals opinions (Pet. 5a; 9a, n. 2.) Furthermore, the Question's implied limitation to "the parties immediately involved in the charge" is apparently calculated to suggest much more circumscribed disclosure than that actually permitted by the EEOC disclosure rules. As will be seen, these rules cannot be harmonized with section 709(e).

[2] Citations to the Petition for a Writ of Certiorari are denominated ("Pet.").

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part as follows:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * * *
>
> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

Section 1601.22 of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.22,[3] provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or

[3] This section supersedes former section 1601.20, which was in effect at the time this suit arose. 29 C.F.R. § 1601.20 (1975). The earlier provision is quoted in the district court's opinion (Pet. 19a).

> information. This provision does not apply to such earlier disclosure to charging parties or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the regulations of the Equal Employment Opportunity Commission, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

The EEOC's special disclosure rules contained in EEOC Compliance Manual § 83, are set forth in Appendix E to the Petition for a Writ of Certiorari (Pet. 33a-46a).

Counter-Statement of the Case

A. *Statutory Framework.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, created substantive rights to end discrimination in employment. It also prescribed a carefully balanced plan of enforcement. Congress envisaged a four-step procedure, consisting of the filing of a charge, investigation, a determination by the EEOC whether reasonable cause exists to believe a violation has occurred and, if so, use of conference, conciliation, and persuasion to resolve the matter. In the event such informal means were unavailing, Congress provided for litigation as a last resort. *See generally Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 365-366 (1977).

Congress entrusted the EEOC with broad investigatory powers to obtain information from charged employers.[4] As a counterpoise, however, Congress imposed upon the EEOC an equally broad duty to preserve the confidentiality of the information gathered during its investigations. It must refrain from "mak[ing] public in any manner whatever any information" it obtains prior to suit. Section 709(e).[5]

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[4] The EEOC has the right to access, at all reasonable times, to any person or company being investigated, for the purpose of examining and copying any evidence "that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(e). It has subpoena power to "requir[e] the attendance and testimony of witnesses or the production of any evidence" during its investigations of charged parties. *See* 42 U.S.C. § 2000e-9, incorporating section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

[5] 42 U.S.C. § 2000e-8(e). The text of this section is reprinted *supra* at 2.

Another section of Title VII, 706(b), 42 U.S.C. § 2000e-5(b), also imposes non-disclosure obligations upon the EEOC. That

In this case, the Court must decide whether the EEOC has improperly ignored this statutory prohibition.

B. *Facts and Proceedings Below.*

From 1971 through 1973 several employees and former employees of Joseph Horne Company ("Horne's"), a division of Associated Dry Goods Corporation ("Associated"), filed charges of employment discrimination against Horne's (Pet. 17a). All but one of these charges alleged sex discrimination. In February and April, 1974, the EEOC began investigating the charges by serving "interrogatories" on Horne's (Pet. 17a) (J.A. 19-21). These interrogatories sought a wide range of information concerning Horne's business and employment practices, not limited to the situations of the individual charging parties. *See* 419 F. Supp. at 817.

Horne's refused to answer the interrogatories without assurances from the EEOC that the information sought would not be disclosed to the charging parties, their counsel or others (Pet. 3a; 17a).[6] The Company's reluctance stemmed, in part, from a Commission employee's transmittal of the February, 1974 interrogatory—containing the names of all the charging parties, the case number assigned to each charge, and questions from which the nature of the charges could easily be inferred—to an attorney

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section prohibits the EEOC from making public charges filed with it or anything said or done during "informal endeavors" by the agency to resolve such charges by conference, conciliation and persuasion.

[6] Contrary to the EEOC's suggestion (EEOC Brief at 11), the Company's concern for disclosure extended beyond revelations to "the Charging parties, their attorneys, or witnesses interviewed during the investigation" to "safeguards [the Commission] provide[s] which will preclude said persons from in turn transmitting [investigative file] information to others" (J.A. 26).

for one or more of the charging parties.[7] 419 F. Supp. at 817.

The EEOC refused to offer these assurances of confidentiality (Pet. 17a). It stated that its policy was to disclose to charging parties not only their own case files (including information provided by the employer in response to EEOC interrogatories), but also "related case files,"—files involving the same employer compiled during investigations of similar charges brought by other persons (Pet. 17a; 43a). The only restriction placed on disclosure of materials in these files by the EEOC was that the requesting party agree to use the information only in connection with pending or "contemplated" litigation and (after June, 1975) agree in writing not to make the information public except in the normal course of a civil action or other proceeding under Title VII (Pet. 17a; 38a).[8] The EEOC conceded, however, that it had "no way of preventing charging parties from transmitting information" to others (Pet. 17a-18a).

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[7] The EEOC never ascertained how many charging parties this attorney represented (J.A. 70). The attorney also represented certain labor unions which had collective bargaining agreements with Horne's, *see EEOC* v. *Joseph Horne Co.*, 13 FEP Cases 892, n. 1 (W.D. Pa. 1976), and certain competitors of Horne's (J.A. 8).

[8] The EEOC does not always abide by this rule. In June, 1976, Alice M. Corvino, one of the charging parties involved in the investigation (J.A. 8), commenced a Title VII action against Horne's, alleging that the Company had engaged in sex discrimination against women as a class. *Corvino* v. *Joseph Horne Co.*, Civil Action No. 76-826 (W.D. Pa.). Prior to filing suit, Ms. Corvino's attorneys were permitted access to her EEOC case file and to the files of other employees who had filed sex discrimination charges against Horne's (J.A. 102-104). Although the EEOC disclosed this information, it evidently failed to obtain a written agreement of nondisclosure prior to permitting counsel to examine the files of other employees, for it could not provide the dates on which the examinations were made (J.A. 103-104).

Since the parties were unable to agree on confidentiality for Horne's records, Associated commenced this action for declaratory and injunctive relief against the EEOC disclosure rules (J.A. 16).

The district court held that the disclosure prohibitions of Title VII barred the EEOC from "furnish[ing] materials from its investigative files to employees contemplating private Title VII litigation against employers under investigation by the Commission." (Pet. 21a). It concluded, in agreement with the District of Columbia Circuit in *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978) ("*Sears*"), that the Act "prohibited the EEOC from disclosing its investigative files to anyone outside the government, including charging parties." (Pet. 24a). The court therefore enjoined application of the EEOC disclosure rules (J.A. 111-112).

The court of appeals affirmed (Pet. 2a). Finding itself "in essential agreement with the district court" (Pet. 4a), the Fourth Circuit followed the District of Columbia and the Seventh Circuits in *Sears* and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) ("*Burlington Northern*"), respectively, holding that the EEOC disclosure rules conflict with section 709(e), and impede voluntary adjustment of employment discrimination charges (Pet. 6a-7a).[9]

This Court granted *certiorari*, —— U.S. ——, 100 S.Ct. 1311 (1980).

Against this backdrop we turn to the disclosure provisions in question.

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[9] Judge Hall dissented (Pet. 7a-13a). He would have upheld the disclosure rules to the extent they authorize charging parties to see their own files. Like the majority, however, he believed that "permit[ting] the charging party to inspect files containing other charges against the same respondent . . . constitute[d] 'publicizing' the other files. . . ." in violation of Title VII (*Id.* at 9a, n.2).

C. *The EEOC's Disclosure Rules.*

In 1975, the EEOC issued detailed rules describing the persons and organizations to be granted access to EEOC case files, and the scope of disclosure which would be available to them. This rulemaking created an exception to the anti-publication requirement of Section 709(e) and affirmatively authorized disclosure.

1. *The EEOC disclosure regulations declare an exception to § 709(e).*

The EEOC's disclosure regulations, 29 C.F.R. §§ 1601.22 and 1610.17(d),[10] set forth the EEOC's policies concerning the disclosure of investigative files.[11] While the opening sentence of section 1601.22 professes adherence to section 709(e), the regulation creates an exception not apparent from a reading of the statute:

> This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief.[12]

Following the enactment of the 1974 amendments to the Freedom of Information Act ("FOIA"),[13] the EEOC deter-

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[10] These sections are quoted *supra* at 3-4.

[11] Former section 1601.20, effective until 1978, permitted "such earlier disclosures to the charging party, the respondent, [or] witnesses . . . as may be appropriate or necessary to the carrying out of the Commission's functions under the title. . . ." (Pet. 19a).

[12] The regulation also permits disclosure to representatives of interested Federal, State or Local authorities "as may be necessary to the carrying out of the Commission's functions, under Title VII. . . ." *Id.* This exception is not at issue.

[13] Pub. L. 93-502, 88 Stat. 1561, 5 U.S.C., § 552, effective February 19, 1975. The FOIA authorizes agencies to issue regulations to process requests for information thereunder. 5 U.S.C. § 552(a)(1)(C).

mined in its FOIA procedural regulations that the exceptions to non-disclosure created by section 1601.22 would be treated as follows:

> *Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed.* The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

29 C.F.R. § 1610.17(d).[14] (Emphasis supplied.) Several months later, on May 21, 1975, these rules were published (J.A. 55).

2. *The Special Disclosure Rules.*

The "special disclosure rules" referred to in section 1610.17(d) have been published in section 83 of the EEOC Compliance Manual (Pet. 33a-46a). These rules authorize disclosure of case files containing investigative data to many persons and organizations, including:

(1) Charging parties and their attorneys;

(2) "Aggrieved persons" and their attorneys in case files involving Commissioner charges;

(3) Persons filing on behalf of an "aggrieved person";

(4) Organizations filing on behalf of an "aggrieved person";[15] and,

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[14] Published at 40 Fed. Reg. 8171 (February 26, 1975).

[15] EEOC rules provide that charges may be filed anonymously by "any person, agency or organization" on behalf of a person claiming to be aggrieved. 29 C.F.R. § 1601.7; *see* 42 U.S.C. § 2000e-5(b). Competitors, unions or other organizations with interests

(5) Employees of EEOC funded groups (e.g., the Mexican American Legal Defense and Education Fund, Lawyer's Committee for Civil Rights Under Law).

EEOC Comp. Manual, § 83.5 (a-d) (Pet. 36a).[16] Disclosure is allowed so long as the files are sought "in connection with pending or contemplated litigation," and 180 days have passed since the charge was filed. EEOC Comp. Manual, § 83.3(a) (Pet. 35a).

Disclosure is not limited to the file of the charging party. Other files involving the same respondent which the District Director or Director of the Office of Systemic Programs believe to be "relevant or material to the private litigant's case" may also be revealed. EEOC Comp. Manual, § 83.7(c)(1) (Pet. 43a). Files pertaining to charges alleging the same basis of discrimination (e.g., race or sex) almost always meet this standard. *Id.* at § 83.7(c)(2). (*See* EEOC Brief at 31-32.) And even where other files involve a different basis of discrimination, they are still deemed relevant and disclosable "when the treatment afforded one protected class is probative of treatment afforded the private litigant's class. . . ." *Id.* Thus, the question of relevancy will generally be resolved in favor of the person seeking access.[17]

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inimical to those of the employer, as a "charging party" or his representative, could thus see the EEOC investigatory file of the employer.

[16] In this Court the EEOC contends that the persons to whom disclosure is permissible also includes witnesses (EEOC Brief at 19).

[17] Evenhandedness is not a hallmark of the special disclosure rules. While countenancing extensive pre-suit disclosure to charging parties and others on their behalf, section 83.2(e) prohibits disclosure of EEOC files to respondents until *after* a Title VII lawsuit has been commenced. This disparate treatment is consistent

The disclosure of investigative files permitted by the EEOC rules is substantially broader than that suggested by the question for review. The issue, therefore, is not the propriety of disclosure merely to "the parties immediately involved in the charge" (EEOC Brief at 2); rather, it is whether the EEOC's disclosure rules contravene section 709(e)'s ban on publication. We believe they do.

Summary of Argument

The EEOC disclosure rules conflict with Title VII and important policies underlying that statute. Since these rules treat with litigation assistance to charging parties, and affect important rights of employers, they are clearly substantive. Congress, however, has expressly limited the agency to the issuance of procedural regulations. Consequently, the rules exceed the agency's authority.

Moreover, section 709(e) expressly forbids the EEOC from disclosing, in any manner whatever, any information it obtains through its investigations. This reflects Congress's determination that disclosure of investigative files to anyone outside the government would interfere with the administration and enforcement of Title VII. The EEOC rules, which create significant exceptions to section 709(e), find no support in the language or history of the statute.

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with the EEOC's express policy of helping charging parties begin lawsuits. The Manual states:

> The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or National Programs Division, provided that the information in the other case files is relevant or material to the private litigant's case.

EEOC Comp. Manual, § 83.7 (Pet. 43a).

Equally important, by fostering private litigation, the rules undermine conciliation and direct federal enforcement, the enforcement methods preferred by Congress. Disclosure of investigative files frustrates the administrative process by causing premature judicial intervention. Charging parties are encouraged to file lawsuits before conciliation is attempted. Employers, too, will turn to the courts in order to protect the confidentiality of their records transmitted to the agency during EEOC investigations. Conciliation and voluntary settlements will become more difficult to achieve; cooperation will be replaced by antagonism. Thus, the Commission's disclosure rules do harm to the administration of the statute.

The Commission is able to conduct investigations, issue determinations and conciliate effectively without disclosure. Moreover, no considerations pertinent to the administration of Title VII are furthered by the rules. Finally, because the rules violate section 709(e) and are inconsistent with the policies underlying Title VII, this Court should accord them no deference.

ARGUMENT

POINT I

The EEOC Disclosure Rules Are Invalid Because They Are Substantive and Without Statutory Authority.

The EEOC's disclosure rules are substantive, affecting important rights of parties and others under Title VII. Since Title VII withholds authority from the EEOC to issue such rules, and, in any event, fails to provide a statutory source for them, the Court should declare them invalid.

A. *The EEOC Disclosure Rules Are Substantive.*

1. *The rules are analogous to the disclosure regulations in Chrysler Corp. v. Brown.*

This Court recently considered agency directives similar to the EEOC disclosure rules and concluded that they were substantive. In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), a challenge was raised to regulations of the Office of Federal Contract Compliance Programs ("OFCCP") which provided for "public disclosure of information from records of the OFCCP and its compliance agencies." 441 U.S. at 287.[18] In language instructive here, the Court concluded that the OFCCP regulations were substantive because they:

> certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies.

Id. at 303;[19] *see Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974).

The EEOC disclosure rules likewise affect the individual rights and obligations of charged employers, charging parties and others in Title VII proceedings. These rules govern access to information in records obtained by the

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[18] The OFCCP administers the executive order program mandating that government contractors take affirmative measures to eliminate discrimination in employment. 441 U.S. at 286-287. Government contractors are required to furnish the OFCCP with various documents such as EEO-1 reports and other statistical data concerning their work forces—information not unlike that sought by the EEOC during an investigation of a charge of employment discrimination. (*See* J.A. 19-21).

[19] Several courts of appeals decisions anticipated this test. *See, e.g., Reynolds Metals* v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978), and cases cited therein at 669.

EEOC during Title VII investigations. The confidentiality rights of employers who submit information to the EEOC are compromised in the same manner as were the rights of those who submitted data under the OFCCP disclosure rules. The privacy interests of employees identified in the employers' records are also compromised.

Moreover, the EEOC rules adversely affect the substantive rights of employers by depriving them of their statutory right to try to resolve meritorious charges informally through conference, conciliation and persuasion.[20] The substantive nature of these rules is, therefore, even more obvious than was the case in *Chrysler*, where no similar rights were abridged.

2. *The EEOC disclosure rules have an express substantive purpose.*

The substantive character of the EEOC disclosure rules is confirmed by the purposes they are designed to serve.[21] The rules implement the agency's policy "to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent. . . . " EEOC Comp. Manual, § 83.7(c)(1) (Pet. 43a). *See Burlington Northern*, 582 F.2d at 1100 ("[T]he effect, and indeed the purpose of disclosing investigative material to charging parties as if they were not members of the public would be to encourage the filing of private lawsuits."). *See also H. Kessler & Co.* v.

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[20] *See* 42 U.S.C. § 2000e-5(b), and Point III, *infra*, at 36-38.

[21] The EEOC's changing rationale for permitting such disclosure —from *"carrying out the Commission's functions"* under Title VII to *"securing appropriate relief"*, highlights the litigation oriented purpose of current section 1601.22 and the special disclosure rules. (See n.11 *supra* p. 9, and accompanying text). The earlier rationale was arguably procedural; the present one is patently substantive.

EEOC, 472 F.2d 1147, 1151-1152 (5th Cir. 1972), *cert. denied*, 412 U.S. 939 (1973) *("Kessler")* ("[I]t is obvious that a charging party literally needs all the help he can get" to commence a timely action.)

An agency rule authorizing this kind of affirmative assistance to one party in an administrative proceeding was found to be substantive in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). There, the Court considered the National Labor Relations Board's "Excelsior" rule, requiring the disclosure of employee names and addresses to unions during representation proceedings.[22] The First Circuit had held that

> . . . *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.
>
> Such assistance is substance, not Board procedure.

397 F.2d 394, 397-398 (1st Cir. 1968). This Court's plurality opinion specifically affirmed that holding, 394 U.S. at 764, n. 2, with a majority of the Justices agreeing that the rule was substantive. *Id.* at 775 (Douglas, J., dissenting) and 780 (Harlan, J., dissenting).

The purpose and effect of the EEOC's disclosure rules are indistinguishable in principle from the purpose and effect of the NLRB's *Excelsior* requirement. Both are intended to provide "affirmative assistance" to one party in an administrative proceeding, and both require the disclosure of information the employer normally would not release. Both afford a unique advantage to the recipient.[23]

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[22] This rule was articulated in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

[23] At least the NLRB's *Excelsior* rule has the virtue of equalizing the knowledge of the parties; the EEOC's rules, in contrast, dis-

In sum, since the EEOC disclosure rules affect individual rights and obligations, jeopardize statutory rights of employers, and provide affirmative assistance to charging parties, they are clearly substantive.[24] This is fatal; the EEOC has no power to issue substantive rules.

B. *The EEOC Is Prohibited From Issuing Substantive Regulations.*

Section 713(a) of Title VII unequivocally limits the EEOC to the issuance of "suitable *procedural* regulations to carry out the provisions of this title." (Emphasis supplied).[25] *See General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 140 (1976).

The legislative history of section 713(a) confirms that Congress intended to prevent the EEOC from issuing substantive rules. As originally drafted, section 713(a) contained no subject matter limitation on the EEOC's rulemaking authority. *See* H.R. Rep. No. 1370, 87th Cong., 1st Sess. (1963), reprinted in *Legislative History of Titles*

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criminate against employers by disclosing to them the agency's files (which often contain information from witnesses and other third parties), only *after* litigation is commenced. EEOC Comp. Manual, § 83.5(e) (Pet. 37a).

[24] Although the EEOC denominates its disclosure rules as procedural, the label which the agency places on its own rules "is not necessarily conclusive, for it is the substance of what the Commission has purported to do, and has done which is decisive." *Columbia Broadcasting System, Inc.* v. *U.S.*, 316 U.S. 407, 416 (1942); *see also Chamber of Commerce* v. *OSHA*, —— F.2d ——, 8 OSHC 1648, 1651 (D.C. Cir., July 10, 1980).

[25] Section 713(a) provides as follows:

> The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

42 U.S.C. § 2000e-12(a).

VII and XI of the Civil Rights Act of 1964, at 2169, 2001, 2014, 2031 (EEOC 1965) ("*Legislative History*").

An amendment to limit the EEOC's authority to issue procedural regulations only was offered during the House debates by Congressman Celler, a proponent of equal employment opportunity legislation. He explained:

> . . . if this amendment is adopted the Commissioner would have a right to issue procedural regulations as distinguished from substantive regulations. *It would make more definite the limitations of his powers.* I believe the amendment would clarify the situation.

110 Cong. Rec. 2575 (1964) (Emphasis supplied). This amendment was adopted, continued in the Dirksen-Mansfield Senate compromise and appears in the statute today. *Id.; Legislative History* at 3329.

Thus, both the language and legislative history of section 713(a) conclusively show that the EEOC may not issue substantive rules.[26] The disclosure rules, therefore, represent an attempt by the EEOC to exercise a power expressly denied it by Congress. The judgment below invalidating the rules should be affirmed.

C. *The EEOC Disclosure Rules Are Not Authorized by Any Statute.*

Assuming, *arguendo*, that the disclosure rules are procedural, they should nevertheless be invalidated because they lack the requisite statutory authority.[27] *Chrysler*

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[26] Since the rules are substantive, they should also be invalidated because they were not issued in accordance with the Administrative Procedure Act, 5 U.S.C. § 553. *See generally Chamber of Commerce* v. *OSHA*, 8 OSHC at 1652-1653.

[27] *See Parkridge Hosp.* v. *Califano*, —— F.2d ——, Nos. 77-1576 and 78-3171 (6th Cir. 1980) (A regulation authorizing disclosure of financial reports was upheld because 42 U.S.C. § 1306 expressly conferred such regulatory power.)

teaches that, irrespective of the label applied to a particular rule, the rule must be "rooted in a grant of power by the Congress and subject to limitations which that body imposes." 441 U.S. at 302. Just as the OFCCP in *Chrysler* was unable to demonstrate any "*statutory* grant of authority" for its disclosure regulation, *id.* at 306 (emphasis in original), the EEOC here cannot identify any statutory authority for its disclosure rules.[28] This flaw is also fatal.

The EEOC's lack of authority to issue the disclosure rules, however, is not the rules' only infirmity. As we next show, the rules also conflict with the unambiguous confidentiality mandate expressed in section 709(e).

POINT II

Section 709(e) Prohibits the Disclosure of Information in EEOC Investigative Files to All Persons and Organizations Outside the Government.

Section 709(e) of Title VII prohibits the EEOC from "mak[ing] public in any manner whatever any information obtained by the Commission pursuant to its [investigatory] authority . . . prior to the institution of any proceeding under this title involving such information." 42 U.S.C. § 2000e-8(e). As recognized by the court below, this wording makes explicit Congress's intent to prohibit pre-litigation disclosure of investigative files (Pet. 7a). This ban on disclosure was not inadvertent. Congress knows how to authorize the disclosure of investigative data when it so intends. That Congress set forth no exception to section

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[28] That the OFCCP was not faced with a statutory provision such as § 709(e), *prohibiting* disclosure, or a provision such as § 713(a), *limiting* its rulemaking authority, makes the case for invalidation even stronger here than it was in *Chrysler*.

709(e) confirms its intent to prevent pre-litigation disclosure of EEOC investigative files "to any individual outside the government." *Sears*, 581 F.2d at 946.

The EEOC's arguments to the contrary, discussed *infra* at pp. 24-30, are not supported by the history or purposes of section 709(e), and disregard the EEOC's inability to restrict disclosure solely to the charging parties.

A. *Congress Intended to Prohibit the EEOC From Disclosing Its Investigative Files to all Non-Governmental Persons and Organizations.*

1. *The language of the statute is unambiguous.*

To determine whether section 709(e)'s sweeping prohibition against disclosure admits of the exceptions created by the EEOC's disclosure rules, we first examine "the plain meaning of the relevant statutory language." *Mohasco Corp.* v. *Silver*, —— U.S. ——, 48 U.S.L.W. 4851, 4853 (1980). The statutory prohibition against disclosure to the public is clear: "Congress meant to prohibit the EEOC from giving information from its investigative files to any individual outside the government." *Sears*, 581 F.2d at 946. Nothing in the language of the section suggests that Congress intended to permit the EEOC to create exceptions.

2. *Congress intended the EEOC to comply with the standard practice of keeping investigatory data within the government.*

In *Sears*, the court construed section 709(e) in light of the "well-established practice throughout the government[29] . . . to forbid disclosure of sensitive data to any persons

[29] *See also California Brewers Ass'n* v. *Bryant*, —— U.S. ——, 100 S.Ct. 814 (1980), where, in the absence of a statutory definition of the term "seniority system", the Court relied in part on "com-

outside the government." 581 F.2d at 947.[30] Since other investigative agencies "such as the Department of Justice and the National Labor Relations Board, do not give to private litigants information the government has accumulated concerning parties it is investigating," the court reasonably concluded that Congress intended the EEOC to abide by that practice as well. *Id.*[31] Where Congress de-

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monly accepted notions about seniority. . . ." to construe the term. *Id.* at 819. Here, as *Sears* held, the commonly accepted meaning of "the public" refers to all non-governmental persons.

[30] This interpretation is consistent with the "policy in favor of inter-agency exchange of information . . .," *Shell Oil Co.* v. *Dep't of Energy*, 477 F. Supp. 413, 420 (D. Del. 1979), and finds support in Title VII itself. *See* 42 U.S.C. § 2000e-4(g)(1) (EEOC is empowered to cooperate with "regional, State, local and other agencies. . . ."); -4(h) (EEOC "shall . . . cooperate with other departments and agencies" in the performance of its educational and promotional activities); -14 (authorizing the establishment of an inter-agency coordinating council to promote inter-agency cooperation). *See also Emerson Elec. Co.* v. *EEOC*, 609 F.2d 898, 902 (8th Cir. 1979) (Release of EEOC investigative data to OFCCP under inter-agency Memorandum of Understanding upheld because "no public disclosure is authorized or contemplated" and because the possible injury from disclosure "would result only if the information transferred between the agencies were disclosed to the public.")

Consistent with *Sears*' view of section 709(e), courts have construed other non-disclosure statutes to permit disclosure only to government agencies. *See, e.g., Interco* v. *Federal Trade Comm'n*, 478 F.Supp. 103, 106 (D.D.C. 1979) (Disclosure of FTC documents to state attorneys general was "not a release to the 'public' within the meaning of . . . 15 U.S.C. § 46(f). . . ."); *Shell Oil Co.* v. *Dep't of Energy*, 477 F. Supp. at 434 (Disclosure of energy related data between federal agencies is permissible under 15 U.S.C. §§ 771(b) and 773(b) and 18 U.S.C. § 1905 because the commercial value of such data "is put at risk only by disclosure to the public and other disclosures which may result in its use in the market place.")

[31] In addition to these two agencies, many others are forbidden from disclosing investigatory materials. *See, e.g.*, Trade Secrets Act, 18 U.S.C. § 1905; Internal Revenue Code of 1954, § 7213; Federal Energy Administration Act, 42 U.S.C. §§ 771(b) and 773(b); Energy Supply and Environmental Coordination Act, 15 U.S.C. § 796(d).

termines that disclosure of investigatory data "serves the purposes described in the . . . statute," it has provided clear authorization for such agency action. *Parkridge Hospital* v. *Califano,* Slip opinion at 10.

Thus, Congress permits or forbids disclosure of investigative data depending upon the objectives of the particular statute. With respect to Title VII, Congress did specifically authorize some disclosure—it directed service of the charge on the employer. 42 U.S.C. § 2000e-5(b). *See H. Kessler & Co.* v. *EEOC,* 468 F.2d 25, 27 (5th Cir. 1972). It could have—but did not—permit disclosure of investigative information to charging parties or any other person.[32]

This view of section 709(e) is supported by Congress's decision to incorporate in Title VII the NLRB model for investigations.[33] The NLRB does not disclose the contents of its open investigative files outside that agency. *See NLRB* v. *Robbins Tire and Rubber Co.,* 437 U.S. 214 (1978).[34]

Congress could have easily authorized the EEOC to disclose its investigative files, as it did for the Federal Trade

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[32] There is other evidence in Title VII which shows that if Congress wished to authorize disclosure of data by the EEOC, it knew how to do so. Section 709(d) provides that the EEOC "shall furnish" to state or local agencies, upon request, information it obtained pursuant to its record-keeping requirements. 42 U.S.C. § 2000e-8(d). *See also* Note, 25 Wayne L. Rev. 1105, 1113 (1979).

[33] Section 710 of Title VII, 42 U.S.C. § 2000e-9, provides that for "investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act shall apply."

[34] *See also* § 102.118 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.118 (1975); NLRB Case-Handling Manual, Vol. I, Unfair Labor Practice Proceedings, § 10056.1 (1975).

Commission (FTC)[35] and the Consumer Product Safety Commission (CPSC),[36] had it concluded that this would induce compliance with Title VII.[37] Instead, Congress forbade such disclosure, believing that under Title VII "maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in private." *Legislative History* at 3267 (Remarks of Sen. Dirksen). *Cf. Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, —— U.S. ——, 100 S.Ct. 2051, 2056 (1980) (" . . . if Congress had intended to exclude FOIA disclosures from [the procedural safeguards of § 2055(b)(1)] it could easily have done so explicitly. . . . ").

In sum, the plain language of section 709(e) conclusively shows that the EEOC's disclosure rules conflict with sec-

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[35] 15 U.S.C. § 46(b) (FTC given discretion to release documents, except trade secrets and customer lists, obtained during its investigations.) Indeed, Congress considered but rejected the FTC model for the EEOC. (*See* EEOC Brief at 23, n.13.)

[36] 15 U.S.C. § 2055(b) (CPSC empowered to disclose information it acquires about consumer products).

[37] The EEOC contends throughout its brief that Congress implicitly exempted charging parties from section 709(e)'s disclosure ban. Where Congress believes disclosure to certain persons to be in the public interest, however, it explicitly exempts those persons from non-disclosure obligations. Thus, Congress carved out such an exception to a non-disclosure provision in section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b). That section permits the Attorney General to make available "investigative files or other materials" only to state attorneys general and only for use in an actual or potential Clayton Act case. This exception to the Clayton Act's general prohibition on disclosure "places the State attorneys general on a different footing than private parties" and was enacted "because of the important place State attorneys general occupy in Congress's scheme for anti-trust enforcement." *United States* v. *B.F. Goodrich Co.*, —— F.2d ——, Slip opinion at 2, No. 79-4009 (9th Cir. 1980). If Congress had intended to place EEOC charging parties on a different footing than the public generally for purposes of disclosure, it could have followed the Clayton Act model and expressly authorized disclosure of investigative files to them.

tion 709(e), especially in light of (1) Congress's failure to affirmatively authorize disclosure of investigative files and (2) the well-established governmental practice to forbid disclosure of investigative files to those outside the government. The EEOC's contrary view of that section is untenable.

B. *The EEOC's Disclosure Rules Are Inconsistent With the Language and Objectives of Section 709(e).*

1. *Nothing in the language of section 709(e) suggests that Congress contemplated anything but a complete prohibition on disclosure of investigative files.*

The EEOC argues that the language of the statute contemplates the exclusion of charging parties and others from the prohibition on public disclosure (EEOC Brief at 19-22). This argument is unpersuasive. The EEOC mistakenly focuses on the language of section 706(b), and makes no independent argument based on the substantially different language of section 709(e).[38]

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[38] The EEOC argues that since the complainant and respondent know the contents of the charge and are privy to conciliation materials, it would be absurd to construe "the public", to whom disclosure is barred, to include them (EEOC Brief at 20-21). This interpretation of section 706(b) has been rejected by the District of Columbia (*Sears*), Seventh (*Burlington Northern*) and Fourth Circuits. The reasons for this rejection are apparent. Although charges must be revealed to employers, there is every reason to believe that the employer will protect the charges from further dissemination. In contrast, disclosure of investigatory information to aggrieved employees invites wider dissemination. *See* pp. 30-31, *infra*. From the employer's perspective at least, the employee is a member of the "public."

Moreover, the clause in section 706(b), that "charges shall not be made public" is closely followed by a prohibition against using conciliation information as evidence in any subsequent proceeding. Since Congress prevented the EEOC from presenting this information to a court in prosecuting a lawsuit, it is highly unlikely that it intended to permit the Commission to disclose the same or similar information to aggrieved employees to aid them in their

Here, however, the issue is whether the EEOC may disclose the fruits of its investigations despite section 709(e), *not* whether the charge or information voluntarily relinquished during conciliation may be disclosed under section 706(b). Unlike section 706(b), the language of section 709(e) admits of no plausible interpretation which would exclude charging parties or witnesses from its prohibition.

Section 709(e), on the one hand, is sweeping. That section makes it unlawful for the EEOC to make public "in any manner whatever any information" obtained during its investigations. Section 706(b), on the other hand, is more focused. It provides only that "charges shall not be made public" and that "nothing said or done during and as a part of such informal [conciliation] endeavors may be made public. . . . " 42 U.S.C. § 2000e-5(b). Section 709(e) bars disclosure of investigative information "in any manner whatever", suggesting a Congressional concern with indirect disclosure; section 706(b) is more straightforward. By its terms it bars only direct disclosure by the Commission. In short, the language of section 709(e) cannot fairly be read to exclude the persons and organizations to whom the EEOC discloses its files.[39]

Even if the language of section 709(e) is not dispositive, inquiry should not stop there; "we must also look to the object and policy of the law." *Stafford* v. *Briggs*, —— U.S. ——, 100 S.Ct. 774, 780 (1980) (Citation omitted). The

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own court presentations. Thus, even if the Court believes an analogy can be drawn from section 706(b) to section 709(e), the proper construction of the former supports the view that "information obtained by the EEOC during settlement discussions with employers cannot be disclosed to anyone outside the government." *Sears*, 581 F.2d at 948-949.

[39] The EEOC does not interpret the word public consistently. Where the agency itself initiates suit, the EEOC treats charging parties no differently from other "members of the public" in passing on their requests for investigative information under the FOIA. EEOC Comp. Manual § 83.2; 29 C.F.R. §§ 1610.30-36.

"object and policy" of section 709(e) is not furthered by the disclosure rules.

2. *The objectives of section 709(e) confirm that the term "public" includes charging parties and all persons outside the government.*

The EEOC urges that its dubious interpretation of "the public" in section 706(b), *see* n.38 *supra*, should be mechanically applied to section 709(e) (EEOC Brief at 22). However, the two sections protect sufficiently different interests "to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners and Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932).[40]

The charge and conciliation materials, protected by section 706(b) include information which the charging party either already knows, or which the employer has *voluntarily* and directly disclosed to him in the hope of securing a settlement.[41] In contrast, the investigative materials obtained by the EEOC—by investigatory subpoena, if necessary,—

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[40] The Court in *Atlantic Cleaners* recognized that "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Id.* at 433. The proper meaning "may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed." *Id. Accord: Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934); *Marshall* v. *Green Goddess Avocado Corp.*, 615 F.2d 851, 854 (9th Cir. 1980).

[41] As the EEOC notes, "the substance of a charge cannot be concealed from the charging party, who is the author of the charge." (EEOC Brief at 20.) Similarly, the "very concept of conciliation assumes that the parties to the process will be privy to what is said and done during conciliation negotiations. . . ." (*Id.* at 21.) These observations do not apply to the disclosure of investigative files.

are *involuntarily* disclosed to the agency, and generally consist of a wide variety of personnel and business data considered confidential by the employer. The investigation files often contain data from which the identity of employees can be readily ascertained, whereas disclosure to the charging party of either the charge or information for conciliation would not similarly invade the privacy of coworkers.[42]

Information voluntarily revealed by the employer during conciliation cannot be used against that employer in later litigation. *See* 42 U.S.C. § 2000e-5(b). Investigative materials, however, may be used during a subsequent trial. *See* 42 U.S.C. § 2000e-8(e). Investigative files often contain materials and documents relating to the employers' work force as a whole, whereas a charge and conciliation are generally limited to the specific charging party.[43]

These factors call for a strict application of the disclosure ban in section 709(e). There is no basis in the language or logic of that section to warrant excluding charging parties from "the public."

The EEOC's reliance on the language of section 706(b) to exclude charging parties and others from "the public" in section 709(e) is therefore misplaced. That charging parties should be included in the ban on disclosure is confirmed by the legislative history.

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[42] This Court has recognized that disclosing personnel files, which is permitted by the disclosure rules, may impose a great hardship on employees by subjecting them to "embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." *Department of Air Force* v. *Rose*, 425 U.S. 352, 377 (1976); *cf. Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 317, 318 (1979).

[43] The scope of the information sought by the EEOC's interrogatory and subpoena in this case suggests the breadth of materials to be found in the agency's investigative file (*see* J.A. 19-21; 38-42).

C. *The Legislative History of Section 709(e) Fails to Support the EEOC's Exclusion of Charging Parties From "The Public".*

Apart from its unsupported assertion that the language of Title VII supports its disclosure rules, the EEOC relies on the admittedly "sparse" legislative history of the disclosure provisions (EEOC Brief at 22). That history, however, is unavailing to the Commission.[44]

1. *Senator Humphrey's explanation.*

Remarks by Senator Humphrey, who introduced the separate confidentiality provisions in sections 706(b) and 709(e), provide the only contemporaneous legislative explanation of these provisions. 110 Cong. Rec. 12723 (1964).[45] Senator Humphrey said that the prohibitions would not prevent "such disclosure as is *necessary* to the carrying out of the Commission's duties. . . ." *Id.* (Emphasis supplied.) To illustrate, he cited the disclosure to *witnesses* "that a *charge* had been filed and often that *certain evidence* had been received." *Id.* (Emphasis sup-

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[44] The lack of illumination provided by the legislative history of sections 706(b) and 709(e) has been generally recognized. *See Sears,* 581 F.2d at 947; *Kessler,* 471 F.2d at 1150, 1151; Comment, *Access to EEOC Files,* 46 U. Chi. L. Rev. 477, 483-484 (1979); Note, 25 Wayne L. Rev. at 1113.

[45] Senator Humphrey stated:

> Provisions preserving the confidentiality of Commission procedures have been added to sections 706(a) and 709(e). . . .
>
> It should be noted that this is a ban on publicizing and not on such disclosure as is necessary to the carrying out of the Commission's duties under the statute. Obviously, the proper conduct of an investigation would ordinarily require that the witness be informed that *a charge* had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven *charges.*

Id. (Emphasis supplied.)

plied.) Nowhere did he say that the disclosure of investigative files to charging parties or others would be permitted.[46]

It is evident from a comparison of the special disclosure rules with Senator Humphrey's remarks, that the Commission has added its own substantive gloss to the Congressional intent. Although Senator Humphrey contemplated such disclosure as was "necessary" to investigation,—just enough to permit a reasonable investigation of a charge by the agency—the EEOC's rules go much further. They permit access to EEOC case files for the purpose of aiding charging parties in making litigation decisions. EEOC Comp. Manual §§ 83.5, 83.7(c)(1); (EEOC Brief at 37-38). The Senator's remarks did not contemplate disclosure of case files for this purpose.

2. *The 1972 legislative history.*[47]

The EEOC also seeks support from Congress's rejection of a record-keeping amendment proposed during the 1972 debates.[48] (EEOC Brief at 27, n. 15). This amendment would have explicitly granted Congress and government agencies the right to obtain copies of documents employers are required to maintain under section 706(c). The EEOC seeks to infer from this rejection a Congressional decision that the "required records deserved no greater protection than that afforded to other information in the Commission's

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[46] The EEOC's reliance on Senator Humphrey's remarks to justify its disclosure rules has provoked criticism in the scholarly journals. *See* Comment, *Access to EEOC Files*, 46 Univ. of Chi. L. Rev. at 484; Note, 25 Wayne L. Rev. at 1113.

[47] The 1972 legislative history, upon which the EEOC relies, is of questionable value in divining Congress's intent in 1964 when it enacted section 709(e), because "the intent of the Congress that enacted [the section] controls." *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[48] *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 55-56 (1971).

possession." (*Id.*) However, it is equally likely the amendment was rejected as unnecessary because "it merely stated Congress's understanding of section 709(e) as it now stands." *Sears,* 581 F.2d at 948, n. 9.[49]

The EEOC rules, therefore, are a far cry from the limited disclosure contemplated by the proponents of Title VII. Neither the sparse legislative history, nor as discussed earlier, the language of section 709(e), authorizes the wholesale release of case files to charging parties, witnesses, aggrieved persons, organizations and others. The EEOC's rules are simply an invention of the agency which are at odds with its statute.

Aside from these legal infirmities, the EEOC also overlooks the impracticability of restricting disclosure to charging parties.

D. *Disclosure of Investigative Files Cannot Be Restricted to Charging Parties.*

The absence in Title VII of any "effective means to limit distribution of investigatory materials to charging parties alone," *Sears,* 581 F.2d at 946, weighs heavily against the EEOC's assertion that disclosure to a charging party is not disclosure to the public (EEOC Brief at 20-21).[50] Once a charging party, his representative or a witness has access to the case files, further publication cannot be prevented.

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[49] Moreover, the rejected amendment applied solely to routinely kept records, not to investigatory information, and it made no reference to access by the "public." Therefore, any suggestion that Congress endorsed the EEOC disclosure policy by its rejection of this amendment lacks a reasonable basis. *See* Comment, *Access to EEOC Case Files,* 46 U. of Chi. L. Rev. at 485.

[50] Courts permitting inter-agency transfer of information despite non-disclosure statutes have been careful to note the existence of adequate restrictions on retransfer to the public. *See, e.g., Interco* v. *FTC,* 478 F.Supp. at 106; *Shell Oil Co.* v. *Dep't of Energy,* 477 F. Supp. at 434.

Although the EEOC maintains that it exacts from requesting parties promises not to disclose the contents of the investigative files, and has issued a form to this effect (Pet. 23a) "such promises obviously are not enforceable." *Sears*, 581 F.2d at 946.[51] In this case, the District Director of the EEOC candidly conceded that the Commission could not prevent charging parties from disseminating such information. "We can only advise them not to do so," he explained (J.A. 28).

Litigating disclosure after it has occurred is an illusory remedy. (*See* EEOC Brief at 37-38, n. 24). Confidentiality cannot be restored to EEOC files after they have been revealed. Indeed, an employer will seldom be able to prove that the charging party disclosed specific information, or the extent of the disclosure. Damages would be inadequate and difficult to ascertain. The interests of justice and judicial economy also would be disserved by compelling employers to initiate civil suits to enforce rights to confidentiality when Congress has prohibited the EEOC from making disclosures.

Moreover, since charging parties are not protective of a charged employer's interests, materials and information obtained from EEOC case files could be furnished to third parties, such as the media, to embarrass the employer or to unions or competitors for purposes unrelated to Title VII. In our view, these are precisely the evils which Congress sought to avoid by enacting section 709(e).

Thus, the language and purposes of section 709(e), its scant legislative history, and the practical deficiencies of the disclosure rules impel the conclusion that the disclosure rules violate section 709(e). Not only do they conflict with this section, but, as will be seen, they also run counter to

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[51] The facts of this case demonstrate that the Commission does not always obtain such an agreement. *See* n. 8 supra.

the general policy of the entire statute favoring conciliation and direct federal enforcement over private litigation.

POINT III

The Disclosure of Investigative Files Fosters Private Litigation and Conflicts With Title VII's Emphasis on Voluntarism and Direct Federal Enforcement.

Congress selected voluntary adjustment and suit by the EEOC as the primary enforcement mechanisms for Title VII.[52] The purpose and effect of the disclosure rules, however, is to stimulate private lawsuits. EEOC Comp. Manual §§ 83 (Introduction), 83.3, 83.7 (Pet. 33a, 34a, 35a, 43a). In this Point, we will show that this Court's consistent recognition of the primacy of conciliation and direct federal action is clear from the language and history of Title VII. By fostering private litigation, the disclosure rules "wreak havoc upon [Title VII's] intended primary remedy," *Burlington Northern,* 582 F.2d at 1100, n. 7.[53]

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[52] Title VII unambiguously favors conciliation over litigation. If an investigation reveals that there is "reasonable cause" to believe the charge is true, the EEOC

> [*s*]*hall* endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

42 U.S.C. § 2000e-5(b) (Emphasis supplied.) Only if the EEOC is "unable to secure from the respondent a conciliation agreement *acceptable to the Commission,* may the EEOC commence a civil action. *Id.* (Emphasis supplied.) And if the EEOC successfully negotiates an acceptable conciliation agreement to which the charging party agrees, the individual may not commence an action. *Id.* Indeed, even after a civil action has been initiated, the statute authorizes the EEOC to seek a stay to permit "further efforts of the Commission to obtain voluntary compliance." *Id.*

[53] In this case, the EEOC attempts to justify its disclosure rules by emphasizing the importance of the private litigant in enforcing Title VII (EEOC Brief at 40-42). However, in *General Tel. Co.* v. *EEOC,* —— U.S. ——, 100 S.Ct. 1698 (1980), where a contrary argument suited its purposes, the EEOC urged that "Congress contemplated that direct federal enforcement, rather than actions brought by private litigants, would become the primary

A. *This Court Has Recognized That the EEOC's Conciliation Powers Are the Primary Means for Enforcing Title VII.*

When Congress enacted Title VII in 1964, "cooperation and voluntary compliance were selected as the preferred means" for achieving the statute's goal of equality of employment opportunities. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Johnson* v. *Railway Express Co.*, 421 U.S. 454, 461 (1975). This emphasis on conciliation and voluntarism as the primary enforcement mechanism was retained in the 1972 amendments to Title VII.[53a] *See Great Amer. Fed. S. & L. Ass'n* v. *Novotny*, 442 U.S. 366, 372 (1979); *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 365 (1977); *United Steelworkers* v. *Weber*, 443 U.S. 193, 204 (1979) (Blackmun, J., concurring).

B. *The Legislative History Confirms That Congress Viewed Private Litigation as a Subordinate Remedy to Direct Federal Enforcement.*

When Title VII was enacted as part of the Civil Rights Act of 1964, the EEOC was limited to investigatory and

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enforcement mechanism for Title VII following the 1972 amendments." *See* EEOC Brief in *General Tel. Co.* at 10, n. 3. These contradictory positions suggest that the Commission's "interpretation here is primarily litigation inspired." *Cf. Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 100 S.Ct. at 2062, n. 17.

[53a] EEOC officials have testified that conciliation, not private litigation, remains the chief remedy for enforcing Title VII. *See, e.g.*, Testimony of Eleanor Holmes Norton, Chair of the EEOC, during Congressional oversight hearings in 1977, where she stated that because of the many charges filed with the EEOC, "[a]ll of our procedures are being shaped with the objective of encouraging prompt and fair conciliations." Oversight Hearings on Equal Employment Opportunities Before The Subcommittee on Employment Opportunities, 95th Cong., 1st Sess. 8 (1977). She further testified that "the importance of encouraging settlement of Title VII claims cannot be overstated. The congressional intent to encourage settlement is clear in the statutory language mandating conciliation. But the practical imperative is even more demanding." *Id.* at 11.

conciliatory functions. *See* 42 U.S.C. § 2000e-5(b) (1970 ed.).

By 1972, Congress had become convinced that the failure to grant the EEOC enforcement powers was a serious flaw in Title VII. *General Tel. Co.* v. *EEOC*, 100 S.Ct. at 1704, quoting from S. Rep. No. 415, 92nd Cong., 1st Sess. (1971). *See Burlington Northern*, 582 F.2d 1099. The statute's enforcement procedure was therefore amended to culminate in the EEOC's authority to bring a civil action. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 359.

This amendment made clear that while private suit was still available, "the EEOC was to bear the primary burden of litigation." *General Tel. Co.* v. *EEOC*, 100 S.Ct. at 1704. The Section-By-Section Analysis of the amendments,[54] which "provides the final and conclusive confirmation of the meaning" of the private remedy provisions, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 365, states that:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate.

118 Cong. Rec. 7168 (1972).

Indeed, Congress almost abolished the private Title VII action altogether,[55] but retained it "to make sure that the

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[54] This Analysis was before the Senate, 118 Cong. Rec. 7165, 7168 (1972), and the House, 118 Cong. Rec. 7563 (1972). It was also adopted in the Conference Report. S. Conf. Rep. No. 681, 92nd Cong., 2d Sess. (1972).

[55] A Senate amendment (No. 877 to S. 2515) to delete the remedy was defeated by a tie vote of 33-33. 118 Cong. Rec. 3373 (1972). The amendment was introduced because its sponsor believed the possibility of a private suit "reflects badly upon the effort to induce a respondent to enter into a conciliation proceeding with a view of reaching an agreement with the state agency or with the EEOC

person aggrieved does not have to endure lengthy delays if the Commission . . . does not act with due diligence and speed." Section-by-Section Analysis, 118 Cong. Rec. 7168. Only to enable an aggrieved party "to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process" was private litigation preserved. H.R. Rep. No. 238, 92nd Cong., 1st Sess. 12 (1971).[56] As the Seventh Circuit concluded in *Burlington Northern,* "there can be no doubt that the enforcement scheme enacted with the 1972 amendments lodged the primary responsibility for insuring equal employment opportunity with the Commission." 582 F.2d at 1099. (Citation omitted.)

Since, as we show next, the EEOC disclosure rules "necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement," *Burlington Northern,* 582 F.2d at 1100, by "fueling private lawsuits", *Sears,* 581 F.2d at 946, they cannot be reconciled with Title VII.

C. *The Disclosure Rules Undermine the Preferred Means For Enforcing Title VII By Fostering Private Litigation.*

In *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), this Court recognized that:

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or with the employee himself or herself." 118 Cong. Rec. 3368 (1972) (Remarks of Sen. Hruska). Attempts to eliminate the private lawsuit in previous Congresses had failed when the legislators decided not to enact any amendments to Title VII. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act,* 40 Geo. Wash. L. Rev. 824, 832 (1972).

[56] Since the EEOC now asserts that "the average time for processing a charge has been reduced to about two months" (EEOC Brief at 10), the policy considerations which led Congress to retain the private right of action are largely obsolete. Charging parties do not need access to investigative files to decide whether to litigate, but can instead rely upon the EEOC's prompt disposition of their charge.

> the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad in application, as successful conciliation tends to be.

Id. at 461. *See Int'l Union of Elec. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 237, n.9 (1976).

Since disclosure of investigative files encourages private litigation, the EEOC rules produce the undesirable results noted in *Johnson*. They encourage charging parties to bring suit rather than allow the EEOC to attempt conciliation efforts. Employers will not freely participate in an EEOC investigation by producing voluminous records, knowing that at any time after 180 days from the filing of a charge[57] their records may be turned over to a private party to be used in litigation against them.[58] Any benefit derived from private litigation fostered by the disclosure rules, therefore, will be far outweighed by the injury to the public interest in undermining voluntary adjustment of discrimination charges.

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[57] Or even earlier if the charge is dismissed or if the charging party can show a "compelling need." EEOC Comp. Manual § 83.3. (Pet. 34a-35a).

[58] The EEOC does not address these concerns. However, the employers in this case, *Burlington Northern* and *Sears*, were obviously concerned about disclosure. Thus, as soon as the disclosure rules were issued in 1975, they triggered several major lawsuits. Many other employers confronted with EEOC investigations did not bring suit, in all likelihood, because they were unaware of the scope of disclosure permitted by the rules, or relied upon assurances of confidentiality sometimes given by the EEOC (*Sears*, 581 F.2d at 945), or lacked the resources to mount a legal challenge to the agency's rules.

1. *The disclosure rules induce charging parties to litigate rather than conciliate.*

The EEOC disclosure rules induce charging parties to "opt out" of the administrative process. They are prompted to commence litigation before the Commission has had an opportunity to determine the merit of their charges and, if reasonable cause is found, to eliminate any alleged discrimination by "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b).

The present case illustrates the substantiality of these concerns. Associated alleged in its Amended Complaint that the failure of the EEOC to grant confidentiality increased the likelihood of unnecessary litigation by impeding voluntary efforts to resolve the charges (J.A. 15). The Company also alleged that if information were provided, it could be disclosed to potential litigants to the Company's detriment (J.A 15). These fears were justified.

On June 22, 1976, Alice M. Corvino, one of the charging parties in this case (J.A. 8), filed a Title VII action against Horne's, based in part on the allegations in her EEOC charge.[59] Prior to the commencement of Ms. Corvino's action, her attorneys were given access to her EEOC case file and files of other employees (J.A. 103).[60] Ms. Corvino's attorneys also examined at least one EEO-1 Report for Horne's. (J.A. 105).

Had the Company been assured of confidentiality and been permitted to cooperate in the EEOC investigation, a finding of no reasonable cause might have resulted. Ms.

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[59] *Corvino* v. *Joseph Horne Co., a Division of Associated Dry Goods Corporation*, Civil Action No. 76-826 (W.D. Pa.).

[60] The Commission also disclosed documents from other Horne's case files to charging parties' attorneys prior to commencement of other suits. (J.A. 102-104.)

Corvino then would have been less likely to bring suit. Even if a contrary result had been reached, litigation still might have been avoided by a satisfactory conciliation agreement. These possibilities were foreclosed by the EEOC's refusal to preserve the confidentiality of the information it sought.[61]

The courts of appeal agree that the disclosure rules succeed in fostering private litigation. *See Burlington Northern,* 582 F.2d at 1100; *Sears,* 581 F.2d at 946, *Kessler,* 472 F.2d at 1151-1152.[62] By providing charging parties with the materials upon which to base a lawsuit before attempting to conciliate the charge, the EEOC short-circuits the statutory scheme. This administrative restructuring of a Congressionally designed enforcement process should not be condoned.

2. *EEOC investigations will be hindered by employers seeking judicial protection against disclosure.*

In addition to encouraging charging parties to litigate at the expense of conciliation, the EEOC's disclosure rules

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[61] Had the Company, on the other hand, supplied the information and records sought by the EEOC, those materials would have been disclosed and presumably used in Ms. Corvino's action. This would have enabled Ms. Corvino and other potential litigants to obtain judicially unregulated pre-complaint discovery. This is abhorrent to fundamental notions of due process, and should not be allowed. *See McKinney* v. *Amer. Can Co.,* 22 EPD ¶ 30,707 (E.D. Mo. 1979) ("The EEOC was not created to be a convenient means of discovery for farsighted plaintiffs. ... ." *Id.* at p. 14, 686.

[62] In upholding the EEOC's interpretation of section 709(e), the court in *Kessler* stressed what it viewed as the important role of private litigation to enforce Title VII. Its failure to recognize the importance of conciliation was criticized in *Sears* and *Burlington Northern,* and more recent Fifth Circuit decisions have cautioned against interfering with "the extremely high premium put by Congress on voluntary settlement[s]. . . ." *United States* v. *City of Miami,* —— F.2d ——, 22 FEP Cases 846 (5th Cir. 1980) and cases cited at 851.

also impede its investigations by forcing employers to seek judicial protection for the data provided to the agency. As the District of Columbia Court of Appeals noted in *Sears:*

> If EEOC files were open to charging parties, employers, realizing the lack of any effective mechanism within the EEOC for restricting the use of information once it leaves the hands of the EEOC, in many cases would refuse to comply voluntarily with investigative demands by the EEOC under § 709(e), thereby forcing the Commission to use subpoena power and suit in the district court in place of amicable negotiations. By doing so, employers would at least have the opportunity to persuade a court to impose effective restrictions on the scope of distribution—something which is beyond the power of the EEOC to do.

581 F.2d at 941. *Accord: Burlington Northern,* 582 F.2d at 1100.

If this Court approves the EEOC disclosure rules, employers will no doubt continue to seek court orders limiting disclosure and prohibiting additional dissemination.[63] This judicial intervention, although necessary, will tend to change the character of EEOC investigations from cooperative to adversarial proceedings.

Thus, extensive disclosure will hamper the favored enforcement tool of Title VII: voluntary adjustment followed, if necessary, by suit by the EEOC.[64] Even where private litigation is not begun, the disclosure rules will compel employers to refuse to cooperate in EEOC investigations without judicial protection, for fear of giving private parties ammunition to use against them in litigation.

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[63] *See, e.g., EEOC* v. *Univ. of Pittsburgh,* —— F. Supp. ——, 22 FEP Cases 569 (W.D. Pa. 1980).

[64] For a discussion of other adverse consequences arising from the disclosure rules, *see* Note, 25 Wayne L. Rev. at 1116-1117.

As we show next, these high costs to the enforcement of Title VII are entirely unnecessary, since the proper administration of Title VII does not require disclosure of investigative files.

POINT IV

Disclosure of Investigative Files Is Unnecessary for the Proper Administration of Title VII.

The EEOC's plea that early disclosure of investigative data is necessary to the proper administration of Title VII does not withstand scrutiny (*see* EEOC Brief at 28-44).[64a] Disclosure of investigatory files is simply not compelled by the logic of the statute or the need of the EEOC to conduct effective investigations.

A. *Congress Provided Title VII Plaintiffs With Statutory Assistance Other Than Disclosure of Investigative Files.*

The EEOC argues that disclosure of case files is necessary to help charging parties commence litigation (EEOC Brief at 40-42).[65] Regardless of the merit of this solicitude

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[64a] The EEOC offers no empirical evidence to support its assertion that its disclosure rules are responsible for the increased number of settlements since 1977 (EEOC Brief at 29, n. 16). Since the EEOC asserts its disclosure policies have been consistent since 1965 (EEOC Brief at 6), the increased rate of settlements since 1977 obviously cannot be attributed to the disclosure rules. Moreover, the EEOC's claimed settlement rate since 1977 (44%) is considerably lower than the rate of the NLRB, an agency which does *not* disclose its investigative files. *See NLRB* v. *Robbins Tire and Rubber Co.*, 437 U.S. at 222, n. 17. ("According to the Board, 94% of all unfair labor practice charges filed are resolved short of hearing. . . .")

[65] In so contending, the EEOC overlooks the function of its own reasonable cause determinations. Section 40.1 of the EEOC Comp. Manual provides, in part:

> The reasonable cause decision shall constitute a determination that the claim has sufficient merit to warrant litigation if the

towards one party to a legal dispute, the *means* chosen by the agency (disclosure of investigative files) was forbidden by Congress in section 709(e). The statute "gives the private Title VII litigant adequate means of prosecuting the litigation," *Sears,* 581 F.2d at 947-948, without such disclosure. Section 706(k) permits "the prevailing party . . . a reasonable attorney's fee as part of the costs" in the court's discretion. A court is also empowered to "appoint an attorney . . . and [to] authorize the commencement of the action without the payment of fees, costs or security." Section 706(b) (1). Clearly, the EEOC's concern that a private litigant may have difficulty securing counsel has been "substantially alleviated by the 1972 Act." *Burlington Northern,* 582 F.2d at 1101.[66]

B. *Disclosure of Case Files Is Not Necessary to EEOC Investigations or Determinations.*

Notwithstanding section 709(e), the EEOC contends that "limited" disclosure "of investigatory information is essential to the Commission's fulfillment of its statutory mandate at virtually every step of the administrative process."

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matter is not thereafter conciliated by the Commission or the charging party.

If reasonable cause exists to believe that a Title VII violation has occurred, the charging party will have ample opportunity to bring suit and obtain discovery in his own right. But this will not occur until *after* the EEOC has had a chance to conciliate, a result consistent with the statutory scheme. Since the EEOC now resolves charges, on the average, in two months (EEOC Brief at 10) a charging party would suffer no hardship by allowing the administrative process to run its course.

[66] The 1972 amendments extended the time within which a suit must be commenced, from 30 to 90 days, following receipt of the right to sue letter. *Sears,* 581 F.2d at 948. This change, as well as the statutory provisions noted above, persuaded the District of Columbia Circuit that "aggrieved employees are not unduly hindered in commencing suit within the required time unless they are given ready access to the investigatory files of the EEOC." *Id.*

(EEOC Brief at 42.) This is gross overstatement. Disclosure of investigative files is not needed either for the EEOC's investigations or determinations, the two steps in its administrative process for which the EEOC asserts disclosure is essential. (EEOC Brief at 29-32 and 32-36.)

1. *Dislosure of investigative files is not necessary for the EEOC to conduct its investigations.*

The EEOC wrongly argues that its investigations "depend upon early and direct disclosure of information *to the parties.*" (EEOC Brief at 29.) (Emphasis supplied.) If this were true, the Commission would not have prohibited disclosure of investigative data to a respondent-employer until *after* suit is commenced. EEOC Comp. Manual, § 83.5 (e) (Pet. 37a).[67] Thus, the EEOC's own rules refute its contention that its investigators must be "able to confront the parties with their adversaries' evidence." (EEOC Brief at 28.)[68]

Similarly, the EEOC's further claim that disclosure of investigative information is necessary to make its fact-finding conferences effective (EEOC Brief at 29-30), is also contradicted by its own rules. Section 14.7 of the EEOC Compliance Manual[69] makes clear that the disclosure permitted

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[67] Even the statement of facts which the charging party is required to file in support of the charge (EEOC's Brief at 29), is not disclosed to the employer under this rule until suit is filed.

[68] Contrary to the Commission's suggestion (EEOC Brief at 28-29), information is *not* disclosed in a ritualistic exchange among EEOC investigators and parties in an effort to authenticate documents or obtain corroboration. Indeed, the Commission's policy is that "generally, interviews should be conducted in *private.*" EEOC Comp. Manual § 23.1(a) (Emphasis in original.) Rather, the EEOC simply makes its case files available to charging parties and others. EEOC Comp. Manual § 83.3(a) (Pet. 35(a)).

[69] This section, entitled "Conference Format," provides that the fact-finding conference is "an informal investigative technique, not

by the EEOC rules does *not* occur at the fact-finding conference. As the EEOC observes (EEOC Brief at 30), "the fact-finding conference is primarily an investigative forum" at which the EEOC obtains information; it is not a vehicle to disseminate investigative data protected by section 709(e).[70]

2. *Disclosure of investigative files is unnecessary for the agency's determinations.*

Just as disclosure of investigative files is unnecessary to an effective investigation, it is unnecessary to the agency's determinations.[71] Nothing in the regulation governing determinations, 29 C.F.R. § 1601.21, or section 40 of the Compliance Manual, which prescribes the format for determination letters, indicates that disclosure is necessary.

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an adversary proceeding." No disclosure of information or documents is authorized. Even if evidence has been previously submitted to the EEOC, it is *not* disclosed to the other party at these conferences. At most, a "pre-prepared [*sic*] *list* of evidence . . . will be presented to the parties at the table." *Id.* at 14.7(a) (Emphasis supplied). If "the respondent has brought evidence to the conference", it is *not* disclosed to the charging party; rather, "it is received by the [investigator] who will give a brief descriptive title to each type of document presented, so that the charging party is aware of the type of evidence presented to the Commission by the respondent." *Id.*

[70] Since the EEOC does not now make available its files at the fact-finding conference, invalidation of its disclosure rules would not render the conference "meaningless and perfunctory". (EEOC Brief at 30.) In addition, preventing the EEOC from *disclosing* investigative data would not hamper the EEOC from *acquiring* such data, the true purpose of any investigation. If settlement discussions are undertaken at these conferences, the parties can voluntarily disclose to each other whatever information they deem appropriate to further negotiations without violating section 709(e).

[71] The EEOC no longer gives detailed factual findings in the determination letter. (EEOC Brief at 10, n. 6.) Evidently, the EEOC recognizes that such disclosure is unnecessary to fulfill the purposes of the determination.

Indeed, the Manual states that the purpose of the determination letter is to state whether the "case is worthy of litigation. . . ." EEOC Comp. Manual § 40.1. The brevity of the determination letter[72] prevents the EEOC from disclosing in that letter the often voluminous contents of EEOC investigative files. Since the determinations now do no more than summarize the salient points of the investigation, invalidation of the disclosure rules will not hamper the Commission.[73]

In addition, the apparent statutory purpose of the reasonable cause determination, to trigger conciliation efforts, *see* 42 U.S.C. § 2000e-5(b), can be accomplished without making case files available under the disclosure rules. To serve as the basis for conciliation, the determination need only capsulize the evidence, recite the parties' contentions and explain the agency's decision. This suffices to give the charging party the benefit of the EEOC's appraisal of the case without jeopardizing the confidentiality of investigative files or infringing on other employees' privacy rights.[74]

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[72] The ordinary "one and two issue case will result in a letter of less than a page and a half." *Id.* at § 40.7. Even in complex, multi-issue cases, determinations will be made in "less than three pages." *Id.* The facts and conclusions portion of the letter "should be concise" and should be derived from "paragraph '(c)' of the investigator's memo." *Id.* Paragraph "(c)" in turn, is expected to contain only "a brief summary of the facts. . . ." *Id.* at § 29.2(d).

[73] The EEOC has continued to function in the District of Columbia, Seventh and Fourth Circuits despite the decisions in *Sears, Burlington Northern* and this case. In fact, the EEOC assertion that it now processes most charges within sixty days (EEOC Brief at 10), undermines its argument that non-disclosure would hamper the effective administration of Title VII.

[74] Such a summary would also serve other purposes of the determination letter. The Compliance Manual provides that the "primary purpose of a 'no cause' decision is to indicate to CP [the Charging Party] that the Commission has fully considered his allegation and to enable CP to understand why the Commission has concluded that discrimination did not occur." EEOC Comp.

Thus, disclosure of its files is not necessary for the EEOC to either investigate charges or make determinations. In fact, as discussed in Point III, *supra,* the precipitate disclosure of investigative files actually impedes the Commission's investigative and conciliation functions. The judgment below enjoining such disclosure should be affirmed.

POINT V

This Court Should Not Defer to the EEOC's Administrative Interpretation of Section 709(e).

In a final effort to secure judicial approval of its disclosure rules, the EEOC asks this Court to defer to its administrative interpretation of section 709(e). (EEOC Brief at 26.) As will be seen, however, deference is not warranted here.[75]

A. *The EEOC's Present Interpretation of Section 709(e) Was Not Contemporaneous With the Enactment of That Section, Has Not Been Consistent and Does Not Engage the Agency's Expertise.*

The EEOC contends that "in the past fifteen years, the Commission has not varied from [its] contemporaneous construction of its statute. . . ." (EEOC Brief at 25.) The special disclosure rules, however, were not adopted until May 21, 1975. (J.A. 12). Consequently, these rules are

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Manual, § 125.2. It is already the Commission's policy in this situation "to state the evidence as simply as possible." *Id.* The purpose of a "cause" decision "is to persuade R [Respondent] that a violation of title VII has occurred." *Id.* at § 125.3. However, the EEOC already does this without disclosing its files to employers. EEOC Comp. Manual § 83.2(a).

[75] None of the courts which have considered the question have deferred to the EEOC's interpretation. *See e.g., Sears,* 581 F.2d at 946, n. 6, *Burlington Northern* court, 582 F.2d at 1099.

not contemporaneous with the enactment of section 709(e) in 1964.

Moreover, the EEOC regulations governing disclosure have *not* been consistent over the years. The agency has changed the purpose of its disclosure regulations from assisting *the EEOC* in fulfilling its administrative functions under Title VII to assisting *charging parties* in preparing for litigation and securing appropriate relief. *Compare* former 29 C.F.R. § 1601.20 (1975) *with* current 29 C.F.R. § 1601.22 (Pet. at 3-4). *See* nn.11 and 26 *supra.*

Nor is this a case where the court should defer to "an agency's technical expertise and experience", *FPC* v. *Florida Power and Light Co.*, 404 U.S. 553, 563 (1972).[76] The EEOC's presumed substantive expertise does not extend to questions arising under information statutes,[77] or provide the agency with any special insight into what Congress meant by the statutory term "public."

Accordingly, deference is not appropriate here because "the question sought to be reviewed does not significantly engage the agency's expertise." *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *see Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J. dissenting).

B. *Congress Has Not Approved the EEOC's Interpretation of Section 709(e).*

The EEOC's assertion that since Congress has not indicated its disapproval, "it must be assumed that Congress

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[76] At least one commentator has agreed. Comment, *Access to EEOC Files*, 46 U. of Chi. L. Rev. at 486.

[77] With respect to the FOIA, another informational statute, "Congress rejected the traditional rule of deference to administrative determinations by '[p]lacing the burden of proof upon the agency' to justify the withholding. S. Rep. No. 813, p. 8; H.R. Report No. 1497, p. 9." *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80 (1973) (Douglas, J. dissenting).

has approved the agency's construction" of section 709(e) (EEOC Brief at 28), cannot survive scrutiny. This Court will not presume general congressional awareness of an administrative construction when a complex statute is being substantially revised. *Securities and Exchange Commission* v. *Sloan,* 434 U.S. 103, 118-120 (1978). Here, the EEOC has failed to demonstrate that the question now before the Court was even considered, much less decided, by Congress during the 1972 amendments.[78]

C. *The EEOC's View of "The Public" Is Inconsistent With Section 709(e).*

The EEOC's interpretation of section 709(e) should not be given deference for its "interpretation of the statute cannot supersede the language chosen by Congress." *Mohasco Corp.* v. *Silver,* 48 U.S.L.W. at 4855, citing *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-142 (1976).[79] As

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[78] Moreover, at the time the amendments were introduced, the only court to have considered the EEOC disclosure practices was the district court in *H. Kessler & Co.* v. *EEOC,* 53 F.R.D. 330 (N.D. Geo. 1971), which had invalidated them. There, the court held that section 709(e) "preclude[d] the EEOC from disclosing information obtained through its investigation to the charging party, the charging party's attorney, or the petitioner here, prior to institution of court proceedings under Title VII of the Civil Rights Act." *Id.* at 341. Thus, Congress's failure to amend section 709(e) in 1972 signals, if anything, its acquiescence in the then prevailing judicial construction. *See Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978).

[79] Generally, EEOC rules are entitled to less deference than those issued by agencies which have been granted the power to issue substantive regulations. *See General Electric Co.* v. *Gilbert,* 429 U.S. at 140-142. The Court has apparently "retreated" from its earlier view expressed in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), relied upon by the EEOC (EEOC Brief at 26), that EEOC rules are entitled to great deference. *See International Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 390-391 (1977) (Marshall, J., dissenting in part and concurring in part). *See also City of Los Angeles* v. *Manhart,* 435 U.S. 702, 719, n. 36 (1978) (The district court "should not have given conclusive weight to the EEOC guideline.").

was the case in *Silver* and *Gilbert*, the EEOC has construed a section of Title VII to reach a result plainly at odds with Congress's intent.

Regardless of the EEOC's prior administrative practice concerning section 709(e), the Court is not relieved of its "responsibility to determine whether that practice is consistent with the agency's statutory authority." *Securities and Exchange Commission* v. *Sloan*, 436 U.S. at 118. "[C]ourts" rather than agencies "are the final authorities on issues of statutory construction. . . ." *Volkswagenwerk* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) (Citations omitted). Here, the EEOC's construction is wrong.

As the courts of appeals have found, the disclosure rules at best reflect a strained interpretation of the term "public". They not only conflict with the language and purposes of section 709(e), but also undermine the Congressional policy favoring conciliation and direct federal action as the preferred means for enforcing Title VII.

The disclosure rules should be invalidated.

CONCLUSION

The disclosure rules represent an ill-advised attempt by the EEOC to substitute its judgment for that of Congress in determining how to best achieve the substantive goals of Title VII. This case calls for the application of the principle that faithful adherence to the legislative requirements "is the best guarantee of evenhanded administration of the law". *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. at 4856.

The judgment of the court of appeals invalidating the special disclosure rules should be affirmed.

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Respectfully submitted,

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